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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT SEATTLE

9 HOWARD JOHNSON  
10 INTERNATIONAL, INC.,

11                   Plaintiff,

CASE NO. C04-110JLR

12                   v.

13 85 FIFTH STREET ASSOCIATES LLC, et  
14 al.,

ORDER

15                   Defendants.

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16 HOWARD JOHNSON  
17 INTERNATIONAL, INC.,

CASE NO. C04-112JLR

18                   Plaintiff,

19                   v.

20 85 FIFTH STREET ASSOCIATES LLC, et  
21 al.,

22                   Defendants.

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24                   **I. INTRODUCTION**

25                   This matter comes before the court on a motion for summary judgment from  
26 Plaintiff Howard Johnson Int'l, Inc. ("HJI"). (Case No. 04-112, Dkt. # 13). The court  
27 has reviewed the parties' submissions and heard argument from the parties on April 20,  
28

1 2005. For the reasons stated below, the court GRANTS HJI's motion in part and  
2 DENIES it in part.

3 **II. BACKGROUND**

4 Defendants are a group of individuals and entities operating a Howard Johnson  
5 hotel in Chehalis, Washington. The two individual Defendants, Lawrence Horowitz and  
6 Andre Tatibouet, were principals in 85 Fifth Street Associates, L.P. and are principals in  
7 85 Fifth Street Associates, LLC, its successor.<sup>1</sup>

8 In June 1997, 85 Fifth Street entered into a License Agreement with HJI. The  
9 License Agreement set forth the parties' ongoing obligations in operating the Chehalis  
10 hotel under the Howard Johnson name. The License Agreement contained a termination  
11 provision and a provision for liquidated damages. When 85 Fifth Street changed  
12 corporate forms in 2000, Defendants Horowitz and Tatibouet jointly executed a guaranty  
13 ("Guaranty") in which they personally guaranteed all obligations of 85 Fifth Street  
14 Associates, LLC.

15 In 1993, Defendant Northwest Lodging, Inc. ("NLI") entered into a Development  
16 Agreement with one of HJI's predecessors. Although NLI apparently was involved in  
17 operating the Chehalis hotel for 85 Fifth Street, NLI is not a party to any agreement  
18 addressing the Chehalis hotel. On its face, the Development Agreement applies only to  
19 other hotels in the northwest. The key portions of the Development Agreement provide  
20 for HJI to make advances to NLI to renovate hotel rooms to meet HJI standards. The  
21 Development Agreement includes a provision for repaying the advances, and provides for  
22 repayment of unpaid advances upon termination of the agreement.

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27 <sup>1</sup>85 Fifth Street Associates, LLC assumed all obligations of 85 Fifth Street Associates,  
28 L.P. in October 2000. Except where the distinction is important, the court will refer to both  
entities as "85 Fifth Street."

In an addendum to the License Agreement, 85 Fifth Street and HJI agreed on a “Development Incentive.” The addendum stated: “As previously agreed, \$1,000 per room x 537 rooms = \$537,000 will be paid upon execution of the license agreement.” License Agreement, Schedule D; License Agreement Sect. 18.2 (incorporating Schedule D into the License Agreement). The parties dispute whether this addendum incorporated the Development Agreement into the License Agreement.

8 It is undisputed that 85 Fifth Street breached the License Agreement by failing to  
9 make required payments to HJI. After a series of notice letters, HJI formally terminated  
10 the License Agreement in September 2003. HJI now seeks summary judgment for  
11 liquidated damages and unpaid recurring fees under the License Agreement as well as the  
12 unpaid portion of advances made under the Development Agreement. HJI also moves for  
13 summary judgment against Defendants' counterclaim for a breach of the covenant of  
14 good faith and fair dealing.

### III. ANALYSIS

In examining HJI's motion, the court must draw all inferences from the admissible evidence in the light most favorable to the non-moving party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden to demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the opposing party must show that there is a genuine issue of fact for trial. Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The opposing party must present significant and probative evidence to support its claim or defense. Intel Corp. v. Hartford Accident &

1 Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). Where a question presented is purely  
2 legal, summary judgment is appropriate without deference to the non-moving party.

3       The facts relevant to HJI's motion are essentially undisputed. There is no dispute  
4 that 85 Fifth Street breached the License Agreement and that Defendants Tatibouet and  
5 Horowitz are personally liable for damages under it. It is also undisputed that damages  
6 for Defendants' breach are \$58,699.07 in unpaid recurring fees and \$100,000 in  
7 liquidated damages. Defendants have presented no evidence to counter the plain terms of  
8 the License Agreement and HJI's evidence that Defendants did not comply with it.  
9       Although Defendants claim that the agreements at issue have been amended or  
10 superseded, they attach no documentation to support those claims. Defendants substitute  
11 repeated generalizations that there are disputed issues of material fact for actual evidence  
12 of such disputes. Their generalizations are insufficient to create a triable issue.  
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14       The court therefore grants HJI's motion as it pertains to the License Agreement.  
15 The court finds that Defendants have not presented evidence to contradict HJI's evidence  
16 that the License Agreement is valid and enforceable, and that the Defendants are liable  
17 for unpaid recurring fees and liquidated damages under the agreement. The court also  
18 finds that the liquidated damages provision in the License Agreement is valid under  
19 Washington law. The court finds that under the License Agreement, Defendants are  
20 liable for \$58,699.07 in unpaid recurring fees and \$100,000 in liquidated damages, plus  
21 prejudgment interest and attorneys' fees as provided in the License Agreement.  
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23       HJI's motion raises only one issue that the court cannot resolve as a matter of law:  
24 the status of the Development Agreement. As noted above, the Development Agreement  
25 on its face does not apply to the Chehalis hotel. In negotiating the License Agreement,  
26 the parties entered a letter agreement under the heading "Development Incentive" that  
27 "\$537,000 will be paid upon execution of the license agreement." License Agreement,

1 Schedule D. HJI states, without further support, that this agreement incorporated the  
2 Development Agreement into the License Agreement. Defendants claim that they instead  
3 negotiated a different agreement, wherein there was no “advance” as described in the  
4 Development Agreement, but rather an “incentive” that they did not have to repay.  
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6 The addendum to the Licensing Agreement creates ambiguity over what previous  
7 agreement the parties memorialized. It might have been the Development Agreement, or  
8 it might have been another agreement on similar terms. Defendants seem to argue that  
9 the \$537,000 payment was a gift from HJI, but they have already repaid all but \$43,800.  
10 It is clear that the “Development Incentive” was a loan from HJI to the Defendants, but  
11 the terms of that loan are not plain from the record. The court thus declines to enter  
12 summary judgment enforcing the Development Agreement.  
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14 The court grants HJI’s motion as it pertains to Defendants’ counterclaim for a  
15 breach of the covenant of good faith and fair dealing. Defendants allege that HJI acted  
16 improperly by making changes to its nationwide reservation center and its training and  
17 marketing programs, and by repositioning Howard Johnson as an economy hotel brand.  
18 Defendants have provided no competent evidence of this conduct. The only evidence  
19 before the court is a declaration from Defendant Horowitz that does not discuss these  
20 allegations. HJI has established the absence of any disputed issue of fact as to the  
21 counterclaim, and the court therefore grants summary judgment against it.  
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#### IV. CONCLUSION

23 For the foregoing reasons, the court GRANTS HJI’s motion for summary  
24 judgment in part and DENIES it in part. (Dkt. # 13). The court notes that this order does  
25 not apply to Defendant Andre Tatibouet, as this action is stayed with respect to him as a  
26 result of his bankruptcy filing.  
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1 Dated this 26th day of May, 2005.  
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JAMES L. ROBART  
United States District Judge